

Testimony of

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**Hearing on
Video Content**

**United States Senate
Committee on Commerce, Science and Transportation**

January 31, 2006

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President & General Manager
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Roanoke, Virginia
On Behalf of the National Association of Broadcasters**

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Good afternoon Chairman Stevens, Co-Chairman Inouye, and Members of the Committee, my name is Robert G. Lee. I am President & General Manager of WDBJ Television, the CBS affiliated station in Roanoke, Virginia. As a local broadcaster, I have first-hand experience with the issues being discussed by the Committee at this hearing. I am also a member of the Television Board of Directors of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

From their hollow complaints about the alleged unfairness of retransmission consent, multichannel video programming distributors (MVPDs) clearly want to have their retransmission cake and eat it to. In one breath, MVPDs complain that broadcasters are unreasonable in negotiating cash payment for carriage of their local signals; in the next, they claim that negotiating for carriage of additional programming is also unreasonable. In essence, MVPDs argue that retransmission consent is invalid simply because broadcasters should give away their signals to MVPDs without compensation in any form. But there is no reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming

provided to MVPDs. This is especially true today, given the rapidly increasing competition by MVPDs with broadcasters for national and local advertising revenue.

Congress Established Retransmission Consent to Create a Marketplace in Which Broadcasters Could Negotiate for Compensation for MVPDs' Use of their Signals

Because Congress created the retransmission consent marketplace nearly 15 years ago, I begin my testimony by reminding us all here today why Congress granted broadcasters retransmission consent rights in the first instance. In short, Congress adopted retransmission consent to ensure that broadcasters had the opportunity to negotiate in the marketplace for compensation from MVPDs retransmitting their signals. As the Federal Communications Commission (FCC) recently concluded, retransmission consent has fulfilled Congress' purposes for enacting it and has benefited broadcasters, MVPDs and consumers alike.

Prior to the Cable Television Consumer Protection and Competition Act of 1992, cable operators were not required to seek the permission of a broadcaster before carrying its signal and were certainly not required to compensate the broadcaster for the value of its signal. At a time when cable systems had few channels and were limited to an antenna function of improving the reception of nearby broadcast signals, this lack of recognition for the rights broadcasters possess in their signals was less significant. However, the video marketplace changed dramatically in the 1970s and 1980s. Cable systems began to include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems started to compete with broadcasters for national and local advertising revenues, but were still allowed to use broadcasters' signals -- without permission or compensation -- to attract paying subscribers.

By the early 1990s, Congress concluded that this failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) (*Senate Report*). Using the revenues they obtained from carrying broadcast signals, cable systems had supported the creation of cable programming and services and were able to sell advertising on these cable channels in competition with broadcasters. Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id.* Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. *Id.* To remedy this "distortion," Congress in the 1992 Cable Act gave broadcasters control over the use of their signals and permitted broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. *See* 47 U.S.C. § 325.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Senate Report* at 36. Congress stressed that it did not intend "to dictate the outcome of the ensuing marketplace negotiations" between broadcasters and MVPDs. *Id.* Congress correctly foresaw that some broadcasters might determine that the benefits of carriage were sufficient compensation for the use of their signals by cable systems. *Id.* at 35. Some broadcasters would likely seek monetary compensation, while others, Congress explained, would "negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system." *Id.* at 36.

Thus, even at the outset, Congress correctly recognized that, in marketplace negotiations between MVPDs and broadcasters, stations could appropriately seek a variety of types of compensation for the carriage of their signals, including cash or carriage of other programming. And while retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its signal, it does provide a broadcaster with an opportunity to negotiate for compensation.

The FCC Recently Recommended that No Revisions Be Made to Retransmission Consent Policies

After some years' experience with retransmission consent, Congress in late 2004 asked the FCC to evaluate the relative success or failure of the marketplace created in 1992 for the rights to retransmit broadcast signals. This evaluation shows that MVPDs' complaints about retransmission consent disadvantaging them in the marketplace or somehow harming competition are groundless. In its September 2005 report to Congress about the impact of retransmission consent on competition in the video marketplace, the FCC concluded that the retransmission consent rules did not disadvantage MVPDs and have in fact fulfilled Congress' purposes for enacting them. The FCC accordingly recommended no revisions to either statutory or regulatory provisions relating to retransmission consent. FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005) (*FCC Report*).

In its report, the FCC concluded that local television broadcasters and MVPDs conduct retransmission consent negotiations on a "level playing field." *Id.* at ¶ 44. The FCC observed that the retransmission consent process provides incentives for both broadcasters and MVPDs to reach mutually beneficial arrangements and that both parties

in fact benefit when carriage is arranged. *Id.* Most importantly, according to the FCC, consumers benefit by having access to the broadcasters' programming carried via MVPDs. *Id.* Overall, the retransmission consent rules have, as Congress intended, resulted in broadcasters being compensated for the retransmission of their stations by MVPDs and MVPDs obtaining the right to carry broadcast signals. *Id.*

Given these conclusions, the FCC recommended no changes to current law providing for retransmission consent rights. Moreover, the FCC explained that the retransmission consent rules are part of a "carefully balanced combination of laws and regulations governing carriage of television broadcast signals." *Id.* at ¶ 45. Thus, if Congress were to consider proposals to restrict broadcasters' retransmission consent compensation, the FCC cautioned that review of other rules, including must carry and copyright compulsory licensing, would be necessary as well "to maintain a proper balance." *Id.* at ¶¶ 33, 45.

MVPDs' Complaints about Retransmission Consent Are Groundless

Especially in light of this recent FCC report, the various repetitive complaints of MVPDs about the alleged unfairness of retransmission consent ring hollow. For instance, some cable operators have complained about the retransmission consent fees purportedly extracted from them by broadcasters. These complaints are especially puzzling because, as the FCC recently reported, cable operators have in fact consistently refused to pay cash for retransmission consent. *FCC Report* at ¶¶ 10, 35. As a result, "virtually all" retransmission consent agreements have involved "a cable operator providing in-kind consideration to the broadcaster," and cash is not yet "a principal form of consideration for retransmission consent." *Id.* at ¶ 10. This in-kind consideration has included the

carriage of affiliated nonbroadcast channels or other consideration, such as the purchase of advertising time, cross-promotions and carriage of local news channels. *Id.* at ¶ 35. Given that cable companies rarely pay cash for retransmission consent of local broadcast signals, this Committee should reject any MVPD claims that broadcasters' retransmission consent fee requests are unreasonable or are somehow the cause of continually increasing cable rates. In fact, in late 2003, a General Accounting Office study did not find that retransmission consent has lead to higher cable rates. *See GAO, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003).

Complaints from MVPDs that some broadcasters attempt in retransmission consent negotiations to obtain carriage for additional programming channels are ironic, to say the least. As the FCC found, broadcasters began to negotiate for carriage of additional program streams in direct response to cable operators' refusal to pay cash for retransmission consent of broadcast signals. *FCC Report* at ¶ 10. Certainly any claims that cable operators somehow have been forced to carry unwanted programming as the result of retransmission consent are disingenuous. Under the retransmission consent regime, no cable operator is compelled to carry *any* channel, whether a local broadcast channel or an allegedly "bundled" programming channel. And if a cable operator prefers not to carry any channel beyond a broadcaster's local signal, cash alternatives are offered in retransmission consent negotiations. For example, EchoStar recently completed negotiations with Hearst-Argyle Television for a cash-only deal at a marketplace rate.

Clearly, MVPDs want to have their retransmission cake and eat it too. In one breath, MVPDs complain that broadcasters are unreasonable in requesting cash payment

for carriage of their local signals; in the next, they assert that negotiating for carriage of additional programming is also unreasonable. In essence, MVPDs argue that retransmission consent is somehow inherently invalid because broadcasters should give their consent to MVPDs without compensation in any form. But there is no legal, factual or policy reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming provided to MVPDs, especially given MVPDs’ increasing competition with broadcasters for advertising revenue. Indeed, when enacting retransmission consent, Congress noted that cable operators pay for the cable programming they offer to customers and that programming services originating on broadcast channels should be treated no differently. *Senate Report* at 35.

Some cable operators have also presented an inaccurate picture of the video marketplace by contending that, in rural areas and smaller markets, powerful broadcast companies have undue leverage in retransmission consent negotiations with local cable operators. This is not the case. The cable industry as a whole is concentrated nationally and clustered regionally and is dominated by a smaller and smaller number of larger and larger entities. This consolidation will only continue assuming that the pending acquisition of Adelphia Communications by Comcast and Time Warner is approved. In contrast, a strict FCC duopoly rule continues to prohibit broadcast television station combinations in medium and small markets. In fact, a majority of cable subscribers in Designated Market Areas 100+ are served by one of the four largest cable MSOs, while only about three percent of the television stations in these markets are owned by one of the top ten television station groups. Thus, in many instances in these 100+ markets,

small broadcasters – which are facing severe financial pressures -- must deal with large nationally and regionally consolidated MVPDs in retransmission consent negotiations. In sum, local broadcasters in medium and small markets do not possess unfair leverage over increasingly consolidated cable operators.

Indeed, in small and large markets alike, nationally and regionally consolidated MVPDs have been able to exert considerable market power in retransmission consent negotiations, at the expense of local broadcasters. In actual retransmission consent agreements, broadcasters have frequently had to accept a number of egregious terms and conditions, especially with regard to digital carriage.

For example, it is not uncommon for MVPDs in retransmission agreements to refuse to carry a station's multicast digital signal that contains any religious programming and/or any programming that solicits contributions, such as telethons or other charitable fundraising programming. MVPDs have refused to carry any digital multicast signal unless the channel is broadcasting 24 hours a day, seven days a week. This requirement is very difficult for most digital stations (especially small market ones) to meet, and thereby makes it virtually impossible for many stations to obtain carriage of digital multicast signals. Under other retransmission agreements, the MVPD agreed to carry only the high definition portion of a broadcast station's digital signal, and the carriage of any portion of the broadcaster's non-high definition digital signal (including even the primary digital signal) remained entirely at the discretion of the MVPD. Other MVPDs have declined to carry the primary digital signals of non-big four network affiliated stations, unless these stations achieved certain viewer rankings in their local markets. Thus, the digital signals of many stations, including WB/UPN affiliates, Hispanic-

oriented stations, religious stations and other independent stations, would not be carried by these MVPDs. It seems highly unlikely that broadcasters would accept such disadvantageous provisions in retransmission agreements, unless the MVPDs were in a sufficiently powerful marketplace position so as to insist on such provisions.

In light of these real-world examples, Congress should skeptically view any complaints from MVPDs as to how they are at the mercy of powerful broadcasters in marketplace retransmission consent negotiations. The current retransmission consent rules also already protect all MVPDs by imposing an affirmative obligation on broadcasters to negotiate in good faith and providing a mechanism to enforce this obligation. *See* 47 C.F.R. § 76.65. In fact, EchoStar was the complainant in the only “good faith” case to be decided on the merits by the FCC. In that case, the broadcaster was completely exonerated, while EchoStar was found to have abused the FCC’s processes. *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001). Unwarranted MVPD complaints about retransmission consent certainly cannot undermine the FCC’s conclusion that MVPDs are not disadvantaged by the existing retransmission consent process. *See FCC Report* at ¶ 44.

Consumers Benefit from the Retransmission Consent Process

Finally, I would like to elaborate on the FCC’s conclusion in its report that retransmission consent has benefited the viewing public, as well as broadcasters and MVPDs. As the FCC specifically noted, broadcasters’ ability to negotiate carriage of additional programming through retransmission consent benefits viewers by increasing consumers’ access to programming, including local news channels. *See FCC Report* at ¶ 35. One excellent example is Allbritton Communications Company’s NewsChannel 8

here in the Washington metropolitan area. NewsChannel 8 is a local cable news network launched as a result of retransmission consent negotiations over the carriage of Allbritton's television station WJLA-TV. It provides local news, weather and public affairs programming, along with coverage of local public events. Further, this programming is zoned separately to better serve viewers in Washington, D.C., the Maryland suburbs and Northern Virginia.

Similarly, Belo used retransmission consent to obtain carriage of its regional cable news channel NorthWest Cable News (NWCN) on cable systems serving over two million households in Washington, Oregon, Idaho, Montana, Alaska and California. NWCN provides regional up-to-the minute news, weather, sports, entertainment and public affairs programming to viewers across the Northwest. These efforts are coordinated with Belo's television stations in Seattle, Portland, Spokane and Boise.

In addition to local news channels, broadcasters have used retransmission consent to provide local weather information on separate channels carried by cable systems. For example, LIN Television provides these local weather channels in several markets, including ones with a history of frequent weather emergencies such as Indianapolis. And beyond this use of retransmission consent to gain carriage for local news and weather channels, broadcasters have recently used retransmission consent negotiations to obtain carriage of their digital signals, thereby both benefiting viewers and, according to the FCC, furthering the digital transition. *See FCC Report* at ¶ 45.

Conclusion

As my testimony makes clear, Congress intended in the 1992 Cable Act to give broadcasters the opportunity to negotiate in the marketplace for compensation from MVPDs retransmitting their signals. The FCC concluded less than six months ago that retransmission consent has fulfilled Congress' purposes for enacting it, and recommended no changes to either statutory or regulatory provisions relating to retransmission consent. This Committee should accept the FCC's conclusion and continue to let broadcasters and MVPDs negotiate in the marketplace for retransmission consent. Especially in light of the FCC's conclusion that local broadcasters and MVPDs generally negotiate on a "level playing field," Congress has no basis for altering the retransmission consent marketplace. *FCC Report* at ¶ 44. Thank you for your time and attention this afternoon.